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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ESCAMBIA COUNTY, FLORIDA, *et al.*,
Petitioners,

v.

HENRY T. McMILLAN, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the "law of the case" doctrine precludes a district court on remand from considering and implementing as a "legislative plan" a remedial election system and reapportionment plan a legislative body adopts where the district court recognizes that the prior decision by it and the court of appeals, refusing to consider as a "legislative plan" a remedial election system and reapportionment plan the legislative body adopted, was clearly erroneous, and the result of that clearly erroneous decision is that a federal court preempts a legislative function and imposes an election system and apportionment plan gerrymandered to provide proportional representation.

2. Whether the preclearance provisions of section 3 of the Voting Rights Act of 1965 are applicable during the remedy phase of a case.

3. Whether the "no retrogression" standard applicable to preclearances under section 5 of the Voting Rights Act of 1965 is also applicable to preclearances under section 3 of the Voting Rights Act of 1965, and, if so, whether the retrogression baseline for section 3 preclearances is the voting practice or procedure in effect when the suit is commenced.

4. Whether an election system and reapportionment plan a legislative body adopts for the purpose of remedying defects found to exist in an at-large election system and which never is implemented may be determined to violate the Constitution and section 2 of the Voting Rights Act of 1965 because it does not guarantee a minority proportional representation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 3

CONSTITUTIONAL AND STATUTORY PROVISIONS 3

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 13

I The Questions Presented by This Case Are of Such Imperative Public Importance as To Require Immediate Settlement by This Court 13

II The Misapplication by the District Court of the "Law of the Case" Doctrine Has Resulted in the Preemption by the District Court of a Legislative Function 15

III This Court Never Has Addressed the Preclearance Provisions of Section 3, and the Issues the District Court's Opinion Presents Are Likely To Be Present in Other Cases in Which Violations in Voting Practices or Procedures Are Found 19

A. The Preclearance Provisions of Section 3 Do Not Apply During the Remedy Phase of a Case but Only to Subsequent, Proposed Changes Affecting Voting 19

B. The Principles Applicable to Preclearances Under Section 5 Should Be Applicable to Preclearances Under Section 3 21

Page

1. The "No Retrogression" Standard This Court Has Enunciated for Section 5 Preclearances Should Govern Section 3 Preclearances 21

2. The Retrogression Baseline Under Section 3 for Determining Whether the "No Retrogression" Standard Has Been Satisfied Is the Practice or Procedure in Effect When the Suit Is Brought 24

IV An Election System or Reapportionment Plan a Legislative Body Adopts for the Purpose of Remedying Violations a Court Has Found to Exist and Which Has Not Been Implemented Cannot Violate the Constitution or Section 2 28

CONCLUSION 30

APPENDIX

A. March 11, 1983 Order and Memorandum Decision in *McMillan v. Escambia County, Florida* 1a

1. Order 1a

2. Memorandum Decision 13a

B. Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit 34a

C. Selected Provisions of the Voting Rights Act of 1965 and Florida's Constitution and Statutes 36a

1. Provisions of the Voting Rights Act of 1965 ..... 36a

2. Provisions of Florida's Constitution and Statutes 43a

TABLE OF AUTHORITIES

Cases: Page

Arizona v. California,
____ U.S. ____, 103 S.Ct. 1382 (1983) 15

Beer v. United States,
425 U.S. 130 (1976) 10, 21, 22

City of Lockhart v. United States,
____ U.S. ____, 103 S.Ct. 998 (1983) 25, 26, 27

City of Mobile, Alabama v. Bolden,
446 U.S. 55 (1980) 29

Dunn v. Blumenstein,
405 U.S. 330 (1972) 13

Escambia County, Florida v. McMillan,
No.A-939 (82-1295) (U.S. May 26, 1983) 12

Escambia County, Florida v. McMillan,
____ U.S. ____, 103 S.Ct. 1766 (1983) 3, 12

McDaniel v. Sanchez,
452 U.S. 130 (1981) 8, 15

McMillan v. Escambia County, Florida,
PCA No. 77-0432 (N.D. Fla. Mar. 11, 1983)
(Order), *appeal docketed*, No. 83-3275
(11th Cir. Apr. 27, 1983) ..... *passim*

McMillan v. Escambia County, Florida,
559 F. Supp. 720 (N.D. Fla. 1983) (Memorandum
Decision), *appeal docketed*, No. 83-3275
(11th Cir. Apr. 27, 1983) ..... *passim*

McMillan v. Escambia County, Florida,
688 F.2d 960 (5th Cir. 1982), *prob. juris.*
noted, ____ U.S. ____, 103 S.Ct. 1766 (1983) ..... *passim*

Page

McMillan v. Escambia County, Florida,
638 F.2d 1239 (5th Cir. 1981), *vacated,*
688 F.2d 960 (5th Cir. 1982), *prob. juris. noted,* ___ U.S. ___, 103 S.Ct. 1766 (1983) 27

McMillan v. Escambia County, Florida,
PCA No. 77-0432 (N.D. Fla. Dec. 3, 1979) (Order), *vacated,* 638 F.2d 1249 (5th Cir. 1981), *vacated* 688 F.2d 960 (5th Cir. 1982), *prob. juris. noted,* ___ U.S. ___, 103 S.Ct. 1766 (1983) ..... *passim*

McMillan v. Escambia County, Florida,
PCA No. 77-0432 (N.D. Fla. Sept. 24, 1979) 9

Reynolds v. Sims,
377 U.S. 533 (1964) 13

Rogers v. Lodge,
___ U.S. ___, 102 S.Ct. 3272 (1982) 29

Upham v. Seamon,
___ U.S. ___, 102 S.Ct. 1518 (1982) 17

Whitcomb v. Chavis,
403 U.S. 124 (1971) 17

White v. Regester,
412 U.S. 755 (1973) 17

White v. Weiser,
412 U.S. 783 (1973) 17

Wise v. Lipscomb,
437 U.S. 535 (1978) 8, 15, 16

Yick Wo v. Hopkins,
118 U.S. 356 (1886) 13

Page

Constitutional, Statutory and Regulatory Provisions:

U.S. Const. amend. XIV ..... *passim*

U.S. Const. amend XV ..... *passim*

Fla. Const. art. VIII
§ 1(e) 4, 10, 12, 17
§ 1(f) 17

Voting Rights Act of 1965
§ 2, 42 U.S.C. A. § 1973 (Supp. 1983) 11
§ 3, 42 U.S.C. § 1973a (1976) ..... *passim*
§ 4(a), 42 U.S.C.A. § 1973b(a) (Supp. 1983) 23
§ 4(b), 42 U.S.C. § 1973b(b) (1976) 23, 24
§ 5, 42 U.S.C. § 1973c (1976) ..... *passim*

Fla. Stat. § 124.01 (1981) 4

Fla. Stat. §§ 125.001-125.74, 125.80-125.88
(1981 & Supp. 1982) 17

28 C.F.R. §§ 51.1-51.54 (1982) 7, 8

Miscellaneous:

H. Rep. No. 439, 89th Cong., 1st Sess.,
reprinted in 1965 U.S. Code Cong. & Ad. News
2437 23

Sup. Ct. R. 18 13

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ESCAMBIA COUNTY, FLORIDA, *et al.*,
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v.

HENRY T. McMILLAN, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners Escambia County, Florida ("Escambia") and the members of the Escambia Board of County Commissioners ("County Commission"),[1] through counsel,

[1]The current members of the County Commission are John E. Frenkel, Jr.; Billy G. Tennant; Kenneth J. Kelson; Gerald Woolard; and Marvin Beck. The remaining parties to this action are: the Supervisor of Elections for Escambia, Joe Oldmixon, who is a defendant but has not joined in this petition; Henry T. McMillan, respondent; Robert Crane, respondent; Clifford Stokes, respondent; and the class of all black citizens of Escambia, respondents. Petitioners Woolard, Frenkel and Tennant have been substituted for Charles Deese, Jack Kenney and Zearl Lancaster, respectively, who were members of the County Commission at the time the suit was brought. This suit also was brought against the School District of Escambia, the Escambia School Board and the members thereof. The School Board aspect of the case was resolved, McMillan v. Escambia County, Fla., 638 F.2d 1239 (5th Cir. 1981), and was not part of the Order and Memorandum Decision to which this petition is directed.

respectfully submit this petition for a writ of certiorari before judgment to the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The March 11, 1983 Order of the United States District Court for the Northern District of Florida in *McMillan v. Escambia County, Florida* is unreported but is reprinted in Appendix A at 1a; the accompanying Memorandum Decision of the district court is reported at 559 F.Supp. 720 and is reprinted in Appendix A at 13a. The September 24, 1982 and February 19, 1981 opinions and decisions of the United States Court of Appeals for the Fifth Circuit in *McMillan v. Escambia County, Florida* are reported at 688 F.2d 960; 638 F.2d 1249; and 638 F.2d 1239 and are reprinted in the appendices to the Jurisdictional Statement (or "J.S.") petitioners herein filed with this Court in *Escambia County, Florida v. McMillan*[2] in Appendix A at 1a and Appendix B at 52a and 30a, respectively. The December 3, 1979 Memorandum Decision and Order, the September 24, 1979 Memorandum Decision and the July 10, 1978 Memorandum Decision and Judgment of the United States District Court for the Northern District of Florida in *McMillan v. Escambia County, Florida* are unreported but also are reprinted in the appendices to the above-referenced Jurisdictional Statement in Appendix B at 54a, 59a, 66a, 71a and 114a, respectively.

JURISDICTION

The Order and Memorandum Decision of the district court to which this petition is directed were entered on

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[2] ___ U.S. ___, 103 S.Ct. 1766 (1983) (noting probable jurisdiction) (No. 82-1295).

March 11, 1983. On April 11, 1983, petitioners filed with the district court a Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit. (The Notice of Appeal is reprinted in Appendix B at 34a.) The appeal was docketed on April 27, 1983, as *McMillan v. Escambia County, Florida*, No. 83-3275 (11th Cir.). Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The provisions of the Voting Rights Act of 1965 and the reapportionment provisions of Florida's Constitution and statutes which are involved in this petition are reprinted in Appendix C at 36a and 43a, respectively.

STATEMENT OF THE CASE

This petition seeks immediate and direct review of the Order[3] and accompanying Memorandum Decision[4] the United States District Court for the Northern District of Florida issued on remand by the United States Court of Appeals for the Fifth Circuit in *McMillan v. Escambia County, Florida ("McMillan III")*[5]. This Court has noted probable jurisdiction over the appeal of the Fifth Circuit's judgment,[6] and the district court's Order and Memoran-

[3]McMillan v. Escambia County, Fla., PCA No. 77-0432 (N.D. Fla. Mar. 11, 1983), *appeal docketed*, No. 83-3275 (11th Cir. Apr. 27, 1983).

[4]McMillan v. Escambia County, Fla., 559 F.Supp. 720 (N.D. Fla. 1983), *appeal docketed* No. 83-3275 (11th Cir. Apr. 27, 1983).

[5]688 F.2d 960 (5th Cir. 1982), *prob. juris. noted*, ___ U.S. ___, 103 S.Ct. 1766 (1983) (No. 82-1295).

[6]Escambia County, Fla. v. McMillan, ___ U.S. ___, 103 S.Ct. 1766 (1983) (noting probable jurisdiction) (No. 82-1295).

dum Decision implement the district court's interpretation of the Fifth Circuit's judgment.

Facts underlying this petition are set forth in the Jurisdictional Statement filed with this Court to appeal the Fifth Circuit's judgment and are incorporated herein by reference. As discussed therein, at J.S. 16-17, the Fifth Circuit remanded the case to the district court with directions to revise the scheduling terms of its remedial order.[7]

Prior to the Fifth Circuit's decision, the County Commission, pursuant to Fla. Const. art VIII, § 1(e); Fla. Stat. § 124.01 (1981), which require non-charter county commissions, following publication of each decennial census, to reapportion county commissioners' districts according to the one person, one vote rule, adopted, on December 22, 1981, a reapportionment plan for Escambia's county commissioners' districts.[8] The Fifth Circuit's decision in *McMillan III* affirmed the district court's December 3, 1979 Order[9] but did not address the reapportionment issue. The December 3, 1979 Order, inter alia, imposed a court-ordered reapportionment plan for the county commissioners' districts, which was based on the 1970 census, and also provided that, following each decennial census, the County Commission was to reapportion the county commissioners' districts.[10]

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[7] *McMillan III*, 688 F.2d at 973. (J.S. at 29a.)

[8] The circumstances surrounding the adoption of the December 22, 1981 reapportionment plan are discussed in the Jurisdictional Statement at 15.

[9] McMillan v. Escambia County, Fla., PCA No. 77-0432 (N.D. Fla. Dec. 3, 1979), *vacated*, 638 F.2d 1249 (5th Cir. 1981), *vacated*, 688 F.2d 960 (5th Cir. 1982), *prob. juris. noted*, ____ U.S. ____, 103 S.Ct. 1766 (1983) (No. 82-1295). (J.S. at 59a.)

[10] *Id.* ¶¶ 1, 4. (J.S. at 59a, 60a.)

On remand, the district court, by letter dated November 29, 1983, directed the parties to submit "a plan and schedule for conducting elections for the Escambia County Commission." The parties agreed that elections should be held as promptly as possible and also agreed on a schedule for elections.[11] However, they disagreed on the apportionment of the county commissioners' districts. Petitioners urged that the county commissioners' districts should be apportioned according to the December 22, 1981 reapportionment plan the County Commission had adopted.[12] Respondents, however, argued that the county commissioners' districts should be apportioned according to the apportionment plan the Escambia School Board recently had adopted and the court had approved for the school board districts, which plan deliberately was designed to provide a district in which blacks comprised a majority of the population and registered voters.[13]

On December 28, 1982, the court held a hearing on the parties' proposals. Following that hearing, the court proposed an order, inter alia, imposing the school board districts as the county commissioners' districts, and requested the parties to comment on that proposal. Petitioners objected to the use of the school board districts because the Florida Constitution and statutes not only allow but require non-charter county commissions to

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[11]Plaintiffs' Submission of Plan and the Schedule for Elections for the Escambia County Commission ¶ 3; Defendants' Proposed Election Plan and Schedule ¶ 1.

[12]Defendants' Proposed Election Plan and Schedule ¶ 2. Petitioners also proposed that the election system, i.e., at-large or single-member district, to govern the elections should be determined by the status of their appeal on the opening date for qualifying for the elections. *Id.*

[13]Plaintiffs' Submission of Plan and the Schedule for Elections for the Escambia County Commission ¶ 2.

reapportion county commissioners' districts, because the school board districts were gerrymandered to provide proportional representation and because the total population deviation in the school board districts, 6.3 percent, was too great to satisfy constitutional standards for a court-ordered reapportionment plan.[14] Respondents acknowledged that the County Commission could adopt and have implemented a reapportionment plan but argued that any such plan first had to be precleared formally under section 3 of the Voting Rights Act of 1965[15].[16] If, within a short period of time, petitioners failed to obtain section 3 preclearance, respondents urged the court to order into effect as the county commissioners' districts the school board districts.[17]

Petitioners contended that the preclearance provisions of section 3 were inapplicable in the then posture of the case.[18] However, in the event the court were to determine that section 3 preclearance was required, petitioners requested the court to preclear its December 22, 1981 reapportionment plan.[19] Finally, petitioners urged the court to issue as promptly as possible whatever order it was going to issue so that, in the interest of resolving the case completely and as expeditiously as possible, the entire case might be able to be submitted to this Court.[20]

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[14]Memorandum of Defendants in Response to the Court's Proposed Remedial Order at 1-4.

[15]42 U.S.C. § 1973a (1976).

[16]Plaintiffs' Proposed Opinion and Order Concerning Remedial Elections at 4-7.

[17]*Id.* at 6-7.

[18]Defendants' Response to Plaintiffs' Proposed Opinion and Order Concerning Remedial Elections at 3-4.

[19]*Id.* at 4 n.2.

[20]*Id.* at 5.

In response to petitioners' comments on the court's proposed order, respondents continued to insist that section 3 preclearance was required and proposed extending by one month the time for the County Commission to obtain such preclearance.[21] In addition, petitioners submitted an alternative reapportionment plan to the Escambia School Board's plan, which plan also deliberately was designed to provide a district with a black population and registered voter majority, but with .5 percent population deviation.[22] Thereafter, respondents opposed petitioners' conditional request for section 3 preclearance on the grounds that petitioners had not complied with applicable procedures and that the December 22, 1981 reapportionment plan did not meet applicable standards for section 3 preclearance.[23]

In reply, petitioners emphasized the conditional nature of their request for preclearance and reiterated their position that section 3 preclearance then was not required.[24] In the event the court were to conclude differently, however, petitioners stressed that all procedures and standards applicable to section 3 preclearance had been satisfied and that the County Commission's December 22, 1981 reapportionment plan should be precleared.[25]

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[21]Plaintiffs' Reply Briefs Concerning Remedial Elections at 1-2.

[22]*Id.* at 3-6.

[23]Plaintiffs' Opposition to County Commissioners' Motion for Section 3 Preclearance of Their Redistricting Plan at 1-3. Respondents contended that the Justice Department's regulations for preclearances sought of the Attorney General under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c (1976), 28 C.F.R. §§ 51.1-51.54 (1982), were applicable to section 3 preclearances sought of the district court. *Id.* at 1-2.

[24]Defendants' Reply to Plaintiffs' Opposition to Defendants' Conditional Request for Preclearance at 1-2.

[25]*Id.* at 2-7.

On February 9, 1983, the district court held a hearing on its proposed order and the issues which had arisen in response thereto. At the outset, however, the court indicated that, on reading this Court's decision in *McDaniel v. Sanchez*,[26] it had come to the conclusion that it and the Fifth Circuit had erred in adopting Justice White's analysis, rather than Justice Powell's analysis, in *Wise v. Lipscomb*[27] for determining whether a remedy a legislative body adopts and submits to a court may be considered as a "legislative plan."[28] The court directed the parties to brief this issue, advised the County Commission that it could adopt for possible consideration as a "legislative plan" a remedial election system and reapportionment plan and directed the parties to brief the issue whether the "law of the case" doctrine would bar consideration by the court of the County Commission's proposal.

Respondents argued that *Wise* and *McDaniel* addressed entirely different issues and that, in *McDaniel*, this Court adopted Justice White's analysis in *Wise*.[29] In any event, respondents contended that, because *McDaniel* was not an intervening decision, the "law of the case" doctrine required the court to carry out the Fifth Circuit's mandate.[30]

Petitioners agreed with the court that *McDaniel* adopted

[26]452 U.S. 130 (1981).

[27]437 U.S. 535 (1978).

[28]Transcript of February 9, 1983 hearing at 9-10, 18-19. The court also rejected respondents' contention that the Justice Department's regulations for preclearances sought of the Attorney General under section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973(c) (1976), 28 C.F.R. §§ 51.1-51.54 (1982), were applicable to section 3 preclearances sought of a district court. *Id.* at 15.

[29]Plaintiffs' Memorandum Brief Concerning *McDaniel v. Sanchez* at 2-5.

[30]*Id.* at 10-12.

Justice Powell's analysis in *Wise* and, therefore, urged the court to consider the remedy issue in the context in which it would have been considered but for the court's decision in *McMillan v. Escambia County, Florida*[31] to apply Justice White's analysis.[32] Petitioners contended that the exception to the "law of the case" doctrine where a prior decision is clearly erroneous and would work a manifest injustice was applicable and allowed the court to consider and to implement the remedy the County Commission had adopted following the February 9, 1983 hearing.[33] That remedy contained alternative election systems and reapportionment plans. Both alternatives provided for a seven-member county commission with five members to be elected from single-member districts and two members to be elected at-large.[34] The alternative preferred by the County Commission apportioned the county commissioners' districts according to its December 22, 1981 reapportionment plan.[35] The other alternative apportioned the county commissioners' districts deliberately to provide a district with a black population and registered voter majority.[36]

On March 10, 1983, the court held a hearing concerning the materials the parties had submitted following the February 9, 1983 hearing. The court determined that the preclearance provisions of section 3 were applicable to the remedy the County Commission had adopted and also

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[31]PCA No. 77-0432 (N.D. Fla. Sept. 24, 1979). (J.S. at 66a.)

[32]Defendants' Memorandum in Response to the Court's February 9, 1983 Letter at 4-7.

[33]*Id.* at 11-12.

[34]*Id.* at Appendix B.

[35]*Id.*

[36]*Id.*

that the "no retrogression" standard this Court had enunciated originally in *Beer v. United States*[37] for preclearances sought under section 5 of the Voting Rights Act of 1965[38] was inapplicable to section 3 preclearances.[39] Finally, the court indicated that it was going to implement as its remedial order respondents' proposal.

On March 11, 1983, the court issued its remedial Order.[41] With the exception of the precise configuration of the apportionment plan and the dates of the elections and terms of those elected, the Order tracks the court's December 3, 1979 Order. The March 11, 1983 Order imposes a five-member county commission with all members to be elected from single-member districts and an apportionment plan, with a .5% population deviation, deliberately structured to provide a district with a black population and registered voter majority. The Order also retains the staggered term feature set forth in Fla. Const. art. VIII, § 1(e) by providing that those elected in the November 1, 1983 general election from districts 1, 3 and 5 shall serve through the general election in 1988 while those elected from districts 2 and 4 shall serve through the general election in 1986.[43]

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[37]425 U.S. 130 (1976).

[38]42 U.S.C. § 1973c (1976).

[39]Transcript of March 10, 1983 hearing at 38, 40.

[40]*Id.* at 102.

[41]McMillan v. Escambia County, Fla., PCA No. 77-0432 (N.D. Fla. Mar. 11, 1983), *appeal docketed,* No. 83-3275 (11th Cir. Apr. 27, 1983).

[42]*Id.* ¶¶ 1, 2.

[43]*Id.* ¶ 5.

The Memorandum Decision[44] accompanying the Order held that the "law of the case" doctrine precluded the court from considering petitioners' proposed remedy because, even though the district court and the Fifth Circuit had erred in adopting Justice White's analysis in *Wise*, there was no manifest injustice warranting application of the exception where a prior decision is clearly erroneous and results in manifest injustice.[45] Even if that exception had been applicable, the court would not have implemented either of petitioners' proposed alternatives. By failing to ensure blacks the opportunity to elect representatives in proportion to their percentage of the population, the court reasoned that both alternatives failed to satisfy the standards the court considered applicable to section 3 preclearances, and, in any event, violated the Constitution and section 2 of the Voting Rights Act of 1965[46].[47] Accordingly, the court would have denied section 3 preclearance.[48]

On April 11, 1983, petitioners filed a Notice of Appeal to the United States Court of Appeals for the Eleventh Circuit of the district court's March 11, 1983 Order.[49] On

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[44]McMillan v. Escambia County, Fla., 559 F.Supp. 720 (N.D. Fla. 1983), *appeal docketed,* No. 83-3275 (11th Cir. Apr. 27, 1983).

[45]*Id.* at 722, 725, 730. The court did conclude that the exception to the "law of the case" doctrine where evidence on a subsequent trial is substantially different allowed the court to reapportion the county commissioners' districts. *Id.* at 722, 730.

[46]42 U.S.C.A. § 1973 (Supp. 1983).

[47]McMillan v. Escambia County, Fla., 559 F.Supp. at 726-27, 729, 730.

[48]*Id.*

[49]The appeal was docketed on April 27, 1983. McMillan v. Escambia County, Fla., No. 83-3275 (11th Cir. docketed Apr. 27, 1983).

April 18, 1983, this Court noted probable jurisdiction over petitioners' appeal of the Fifth Circuit's decision in *McMillan III*.[50] Thereafter, on May 18, 1983, petitioners filed with this Court an Application for Stay of Enforcement of Judgment of the United States Court of Appeals for the Fifth Circuit seeking a stay of the Fifth Circuit's decision in *McMillan III* and district court's March 11, 1983 Order implementing that judgment as well as an order allowing elections for the County Commission to be held, during the pendency of the appeal to this Court, under the at-large system required by Fla. Const. art. VIII, § 1(e) and the County Commission's December 22, 1981 reapportionment plan. On May 26, 1983, Justice Powell denied petitioner's application.[51]

On June 8, 1983, petitioners filed with the United States Court of Appeals for the Eleventh Circuit a Motion for Certification and for Stay of Proceedings requesting the Eleventh Circuit to certify to this Court all issues pertaining to the district court's March 11, 1983 Order and accompanying Memorandum Decision and/or to stay proceedings in the Eleventh Circuit pending this Court's decision on the appeal of the Fifth Circuit's decision in *McMillan III*. Petitioners sought expedited consideration of their motion. However, as of the date of filing of this petition, the Eleventh Circuit had not acted, and petitioners determined that the status of their appeal to this Court did not allow them further to await action by the Eleventh Circuit.

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[50]Escambia County, Fla. v. McMillan, ___ U.S. ___, 103 S.Ct. 1766 (1983) (No. 82-1295).

[51]Escambia County, Fla. v. McMillan, No. A-939 (No. 82-1295) (U.S. May 26, 1983).

REASONS FOR GRANTING THE WRIT

I. The Questions Presented by This Case Are of Such Imperative Public Importance as To Require Immediate Settlement by This Court.

This Court may grant a petition for a writ of certiorari before judgment where a case is of "such imperative public importance as to justify the deviation from the normal appellate practice and to require immediate settlement . . . ."[52] This case concerns one of the most fundamental rights the Constitution provides and protects – the right to vote[53] – as well as the preemption by a federal court of the legislative functions of devising an election system and a reapportionment plan and the imposition of a court-ordered election system and apportionment plan deliberately gerrymandered to provide proportional representation. As such, this case is of the most imperative public importance. Indeed, the importance of the case is reflected by the Court's decision to note probable jurisdiction over the Fifth Circuit's decision in *McMillan III*.

Petitioners have filed this petition so that all issues involved in this case may be resolved at one time rather than in a piecemeal fashion. The remedial aspects of this case already are before the Court,[54] and this petition pertains solely to that issue. Additionally, the Order which has given rise to this petition is virtually identical in its terms to the December 3, 1979 Order the Fifth Circuit affirmed in *McMillan III* and which now is before this Court. However, because the district court recognized that it and

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[52] Sup. Ct. R. 18.

[53] *E.g.*, Dunn v. Blumenstein, 405 U.S. 330, 336 (1972); Reynolds v. Sims, 377 U.S. 533, 562 (1964); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886).

[54] *See* J.S. at 26-29.

the Fifth Circuit previously had employed an erroneous analysis of the remedy issue,[55] the reasoning underlying the March 11, 1983 Order is very different from the reasoning supporting the December 3, 1979 Order.

This suit was filed in March, 1977, and, as a result of its pendency, elections for the County Commission have not been held since 1978. Although elections now have been scheduled for 1983, the election system and apportionment plan which are to govern these elections are inconsistent with the Florida Constitution and statutes and do not reflect the legislative judgment of Escambia's legislative body but, rather, the policy choices of a federal court. Given the length of time this suit has been pending and the uncertainty it has created as to Escambia's form of government, the interests of the people of Escambia will be served best by the immediate settlement of all aspects of this case. In addition, particularly because of the similarity in terms between the district court's December 3, 1979 Order and its March 11, 1983 Order and the close interrelationship between the district court's actions on remand and the aspects of the case already before the Court, the interests of judicial economy will be promoted greatly by the granting of this petition.

In sum, this case is of imperative public importance not only to the people of Escambia but to all people throughout the United States who are governed by officials elected at-large. The ends of justice will be served best by the immediate settlement of the issues arising out of the district court's March 11, 1983 Order and supporting Memorandum Decision together with the issues already before the Court.

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[55]McMillan v. Escambia County, Fla., 559 F.Supp. at 723-25.

II. The Misapplication by the District Court of the "Law of the Case" Doctrine Has Resulted in the Preemption by the District Court of a Legislative Task.

On remand, the district court concluded that, in light of this Court's decision in *McDaniel*, both it and the Fifth Circuit had erred in adopting Justice White's analysis in *Wise* and that Justice Powell's analysis was controlling.[56] Nevertheless, the court refused to consider any remedial election system or reapportionment plan the County Commission adopted because the court also concluded that the "law of the case" doctrine precluded it from doing so.[57]

The court recognized that there are exceptions to the "law of the case" doctrine but rejected petitioners' contention that the exception where a prior decision is clearly erroneous and would work a manifest injustice applied and, therefore, allowed the court to reconsider the remedy issue.[58] Petitioners had argued that the decision to adopt Justice White's analysis was clearly erroneous and that, in light of this Court's admonition that "redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to

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[56]McMillan v. Escambia County, Fla., 559 F.Supp. at 724. Under Justice Powell's analysis in *Wise*, the determination whether a remedial election system or reapportionment plan a legislative body adopts may be considered a "legislative plan," entitled to legislative deference, depends solely on whether the legislative body has exercised its legislative judgment and not whether it has the power, express or implied, to adopt such a plan. 437 U.S. at 548.

[57]McMillan v. Escambia County, Fla., 559 F.Supp. at 722, 725.

[58]*Id.* at 725. This Court recently recognized this exception to the "law of the case" doctrine. Arizona v. California, ____ U.S. ____, ____, n.8, 103 S.Ct. 1382, 1391 n.8 (1983).

preempt,"[59] manifest injustice would result if the court did not revisit the remedy issue and consider as a "legislative plan" the remedy the County Commission adopted following the February 9, 1983 hearing.[60]

While recognizing that the decision to adopt Justice White's analysis in *Wise* was clearly erroneous, the court held that no manifest injustice would result because the remedy the County Commission originally had adopted would not have provided an adequate remedy for the violations the court found to exist.[61] The reasoning underlying the court's holding, however, is totally at odds with decisions of this Court.

After noting that blacks had comprised approximately twenty (20) percent of Escambia's population and seventeen (17) percent of its registered voters, the court compared the remedy it created in its December 3, 1979 Order to petitioners' proposed remedy and criticized petitioners' proposal because "the [Court's] plan was arranged so as to provide . . . [blacks] with an opportunity to elect membership to the commission in proportion to their population percentage" whereas petitioners' proposal "called for a

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[59] *Wise*, 437 U.S. at 539.

[60] Defendants' Memorandum in Response to the Court's February 9, 1983 Letter at 4-6, 12-14.

[61] McMillan v. Escambia County, Fla., 559 F.Supp. at 725. The proposed remedy to which the court was referring was the ordinance the County Commission adopted in 1978 following the Court's decision striking down the at-large election system. *See generally*, J.S. at 10. Except for the apportionment of the county commissioners' districts occasioned by the 1980 census, the remedy the County Commission proposed in 1978 is similar to the remedy it proposed following the February 9, 1983 hearing. *Compare* Notice of Adoption of Ordinance Amending Election Plan *with* Defendants' Memorandum in Response to the Court's February 9, 1983 Letter at Appendix B.

seven member commission . . ." and "would, at most, provide blacks with an opportunity to elect 14% rather than 20% of the commission's membership."[62] This Court, however, consistently has held that minorities are not entitled to proportional representation.[63] The district court, therefore, erroneously rejected petitioners' proposed remedy for failing to guarantee respondents something to which they are not entitled.[64]

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[62]McMillan v. Escambia County, Fla., 559 F.Supp. at 724-25.

[63]*E.g.*, White v. Regester, 412 U.S. 755, 765-66 (1973); Whitcomb v. Chavis, 403 U.S. 124, 149-50 (1971).

[64]Based on this Court's holding in White v. Weiser, 412 U.S. 783 (1973), that "[i]n fashioning a reapportionment plan or in choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary,'" 412 U.S. at 795 (quoting Whitcomb v. Chavis, 403 U.S. 124, 160 (1971), the court also criticized petitioners' proposed remedy for being contrary to state policy and the will of the people of Escambia. McMillan v. Escambia County, Fla., 559 F.Supp. at 725. The Court determined that the provision in Fla. Const. art. VIII, § 1(e) providing for non-charter counties to be governed by five-member county commissions established a "five member state policy" and that the defeat by the voters of Escambia of a charter proposal which, inter alia, provided for a seven-member county commission, with five members to be elected from single-member districts and two members to be elected at-large, reflected opposition to a seven-member commission. *Id.* (The circumstances surrounding the rejection of the charter proposal are discussed more fully in the Jurisdictional Statement at 10-12.)

There are a variety of flaws in the court's reasoning. First, as is apparent from even a cursory reading of *Weiser*, the language of the opinion on which the court relied applies only to court-ordered plans and not to "legislative plans." *Accord* Upham v. Seamon, ___ U.S. ___, ___, 102 S.Ct. 1518, 1521 (1982) ("We held... [in *Weiser*] that. . . in choosing between two *possible court-ordered plans*. . . ." (Emphasis added.)) Moreover, even if the language were applicable, Florida does not have a state policy favoring five-member county commissions. While Fla. Const. art. VIII, § 1(e) provides for five-member county commissions, it does so only for non-charter counties and, then, only in the context of an election system whereby all commissioners are

The district court and the Fifth Circuit clearly erred in adopting Justice White's analysis in *Wise*, and manifest injustice has resulted because the court imposed its own election system and reapportionment plan, gerrymandered to provide proportional representation, instead of allowing the County Commission to perform one of its legislative functions. As a result, the "law of the case" doctrine did not require the court to adhere to the Fifth Circuit's mandate,[65] and the court should have reconsidered the remedy issue.[66]

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elected at-large. In addition, Fla. Const. art. VIII, § 1(f); Fla. Stat. §§ 125.001-125.74, 125.80-125.88 (1981 & Supp. 1982) provide Florida's counties, including its non-charter counties, with broad home rule powers. Included among these powers is the power to adopt a charter which provides for a governing body of more than five members. Accordingly, Fla. Const. art. VIII, § 1(e) properly may not be the basis for rejecting the County Commission's proposed remedy.

Similarly, the defeat of the charter proposal also may not serve as the basis for rejecting the County Commission's proposal. As is typical of charters, this charter proposal covered a wide variety of areas entirely unrelated to the proposed composition of the county commission. Further, the charter proposal provided for five of the seven members to be elected from single-member districts. The court cited no evidence in the record, and none is available, to show that the defeat of the charter proposal was in any way related to the proposed size of the county commission. The defeat could have been based on a variety of considerations completely independent of the proposed size of the commission, including the provision for some commissioners to be elected from single-member districts.

[65]In view of the Fifth Circuit's recognition in *McMillan III* that "[i]n this case . . . we are presented with a fact situation that . . . under Justice Powell's analysis would be considered a legislative plan," 688 F.2d at 972 n. 25 (J.S. at 28a), it is apparent that, if the Fifth Circuit had adopted Justice Powell's analysis, it would have reached an entirely different result on the remedy issue.

[66]Even assuming there were defects in petitioners' proposed remedy, the court should have identified the precise defects and allowed the County Commission to adopt another proposal correcting these defects.

III. This Court Never Has Addressed the Preclearance Provisions of Section 3, and the Issues the District Court's Opinion Presents Are Likely To Be Present in Other Cases in Which Violations in Voting Practices or Procedures Are Found.

This Court never has addressed any issue concerning the preclearance provisions of section 3. The language and legislative history of section 3 suggest results very different from the determinations the district court in this case made. As more and more cases are brought challenging voting practices and procedures, the issues the district court's opinion presents are likely to reappear in those cases in which violations of the voting guarantees of the fourteenth or fifteenth amendment are found. This case presents the court the opportunity to resolve issues pertaining to the preclearance provisions of Section 3 and, thereby, to provide guidance to all other courts faced with these issues.

A. The Preclearance Provisions of Section 3 Do Not Apply During the Remedy Phase of a Case but Only to Subsequent, Proposed Changes Affecting Voting.

Recognizing the possibility that its holding on the "law of the case" issue may have been incorrect, the court next addressed the merits of the remedy the County Commission adopted and petitioners submitted to the court following the February 9, 1983 hearing and determined that it would have denied petitioners' proposed remedy section 3 preclearance.[67] Implicit in this determination is the assumption that section 3 preclearance is required during the remedy phase of a case. The language of section 3,

[67]McMillan v. Escambia County, Fla., 559 F.Supp. at 726.

however, indicates that this assumption was incorrect and that preclearance is required only for changes affecting voting which a state or political subdivision seeks to enforce subsequent to a judgment finding that a violation of the voting guarantees of the fourteenth or fifteenth amendment has occurred within that state or political subdivision and the imposition of the remedy for the violations found. In relevant part, section 3 provides:

> If in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, *in addition to such relief as it may grant,* shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting or standard, practice or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until . . . .[68]

Had Congress wanted to require section 3 preclearance of remedial election systems, reapportionment plans, etc. adopted by a legislative body, it would have made the preclearance provisions applicable in conjunction with the relief implemented by the court rather than as a measure separate from, and in addition to, the remedy. Further, preclearance, at least under section 5, is a time consuming and often burdensome process. The imposition of such a requirement during the remedy phase of a case may serve

[68](Emphasis added.)

only to prolong unnecessarily the resolution of a case. In view of these considerations, this Court should not allow to stand the district court's interpretation of section 3 and its resulting rejection of the County Commission's proposed remedy for failing to satisfy the standards it perceived for section 3 preclearance.

B. The Principles Applicable to Preclearances Under Section 5 Should Be Applicable to Preclearances Under Section 3.

1. The "No Retrogression" Standard This Court Has Enunciated for Section 5 Preclearances Should Govern Section 3 Preclearances.

Both parties agreed that the "no retrogression" standard this Court articulated originally in *Beer* also should be applicable to section 3 preclearances.[69] The court, however, disagreed.[70] While recognizing that the preclearance language of sections 3 and 5 largely are identical, the court determined that, because the preclearance provisions of each section attach in different contexts, preclearance under section 3 "involves no retrogression principle."[71]

The court opined that, if the "no retrogression" standard were applicable to section 3 preclearances,

> defendants could adopt almost any form of discriminatory voting practice, and it would not be subject to preclearance because it would not

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[69] *See, e.g.*, Plaintiffs' Memorandum Brief Concerning *McDaniel v. Sanchez* at 7-8; Defendants Memorandum in Response to the Court's February 9, 1983 Letter at 7-11.

[70] McMillan v. Escambia County, Fla., 559 F.Supp. at 728.

[71] *Id.*

> be worse discrimination than the plan here found to be invalid. Only if such practice was also unconstitutional or violated section 2 [of the Voting Rights Act of 1965] would it be subject to the preclearance test of section 3.
>
> . . . .
>
> Unlike section 5, section 3 was not designed to preserve the status quo. To the contrary, section 3 was designed . . . to prevent a political subdivision found in violation of the constitution [sic] from performing an end run around and circumventing the court's holding by enacting a new voting plan that was no worse than the one that was in effect at the time the suit was instituted.[72]

The court's distinction does not withstand scrutiny.

The court incorrectly assumed that, if the "no retrogression" standard were applicable to section 3 preclearances, legislative bodies could implement discriminatory voting practices or procedures as long as those practices or procedures were no worse than the practices or procedures which a court invalidated. In *Beer,* however, this Court specifically held that a proposed change affecting voting which otherwise satisfies the "no retrogression" standard still may not be precleared under section 5 if it also "so discriminates on the basis of race as to violate the Constitution."[73] The same, of course, would be true of section

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[72] *Id.* at 728-29. As set forth in the opinion, the court incorrectly has set forth the effect of the "no retrogression" test. That standard does not obviate the need for preclearance if the standard is satisfied. Rather, it allows a proposed change affecting voting to be precleared if it does not effect "a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer,* 425 U.S. at 141.

[73] *Id.*

3 preclearances. Moreover, both section 5 and section 3 expressly provide that preclearance of a proposed change affecting voting "shall [not] bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice or procedure."

As is reflected by the virtual identity of language, the preclearance provisions of section 3 have the same purpose and effect as the preclearance provisions of section 5, i.e., to require the covered state or political subdivision to obtain approval of any proposed change affecting voting as a condition of implementing the proposed change. This is confirmed by the legislative history of section 3 which, in relevant part, provides: "This section makes additional remedies available to deal with denials or abridgments of the right to vote in the so-called 'pockets of discrimination' — that is, areas outside the States and political subdivisions as to which the prohibitions of section 4(a) [of the Voting Rights Act of 1965[74]] are in effect."[75] As such, section 3 simply was intended to provide a means of subjecting to preclearance areas not already subject to section 5 preclearance.

The difference between section 3 and section 5 is the triggering event. Preclearance under section 3 is triggered by a judicial decision that the voting guarantees of the fourteenth or fifteenth amendment have been violated.

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[74]42 U.S.C.A. § 1973b(a) (Supp. 1983).

[75]H.Rep. No. 439, 89th Cong., 1st Sess. 23, *reprinted in* 1965 U.S. Code Cong. & Ad. News 2437, 2454. Subsection 4 (a), 42 U.S.C.A. § 1973b(a) (Supp. 1983), prohibits the use of tests or devices in jurisdictions with respect to which the determinations described in subsection 4(b) of the Voting Rights Act of 1965, 42 U.S.C. § 1973b(a) (1976), have been made, and, as discussed at 24 *infra*, the determinations described in subsection 4(b) trigger the preclearance provisions of section 5.

Preclearance under section 5 is triggered by determinations by the Attorney General and the Director of the Census under subsection 4(b) of the Voting Rights Act of 1965[76] that, on one of three, specified dates, a state or political subdivision maintained, as a prerequisite to voting or registration, a test or device and also that, on the same date, less than fifty (50) percent of voting age persons in that state or political subdivision were registered to vote.

While the triggering events differ, the preclearance provisions of sections 3 and 5 identically require jurisdictions which have been determined to have engaged in voting practices proscribed by the Constitution or statutes to obtain prior approval of any proposed change affecting voting. In consequence, the "no retrogression" standard which governs section 5 preclearances also should govern section 3 preclearances.

2. The Retrogression Baseline Under Section 3 for Determining Whether the "No Retrogression" Standard Has Been Satisfied Is the Practice or Procedure in Effect When the Suit is Brought.

Because the district court was of the opinion that the "no retrogression" standard was inapplicable to section 3 preclearances, it did not address specifically the issue of the proper retrogression baseline under section 3. The opinion, however, indicates that the court would not have considered the retrogression baseline to be the voting practice or procedure in effect when the suit was commenced, but, rather, the practice or procedure contained in the district court's December 3, 1979 remedial Order.[77]

[76] 42 U.S.C. § 1973b (b) (1976).

[77] See McMillan v. Escambia County, Fla., 559 F.Supp. at 728, 729-30. The suggestion that the retrogression baseline would be the

The language of section 3 and the analogy to section 5, however, leave no doubt that the retrogression baseline for determining whether a proposed change affecting voting may be precleared is the practice or procedure in effect when the suit is brought. As previously discussed, section 3 preclearance is required where, following a decision finding a violation of the voting guarantees of the fourteenth or fifteenth amendment and the implementation of a remedy, the covered state or political subdivision enacts, during the period for which the court has retained jurisdiction, any "voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced . . . ." Similarly, preclearance under section 5 is required where a covered state or political subdivision seeks to enact or administer "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect" on the specified date preceding the determinations made under subsection 4(b).

In *City of Lockhart v. United States,*[78] this Court recently held that, for purposes of determining whether a proposed change affecting voting satisfies the "no retrogression" standard for section 5 preclearance, the retrogression baseline is the practice or procedure "actually in effect" on the specified date preceding the determinations made under subsection 4(b).[79] The Court based

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practice or procedure set forth in the court's remedial order, of course, refutes the court's assumption that the preclearance provisions of section 3 are applicable during the remedy phase of the case.

[78] _____U.S._____, 103 S.Ct. 998 (1983).

[79] *Id.* at _____, 103 S.Ct. at 1002. By emphasizing that the retrogression baseline is the practice or procedure "actually in effect," the Court also has resolved any suggestion that the remedy contained in its December 3, 1979 Order could serve as the retrogression

this determination "on the plain reading of the section's language."[80] The plain reading of the preclearance language of section 3 similarly leaves no doubt that the retrogression baseline for section 3 preclearances is the practice or procedure actually in effect on the specified date preceding the decision giving rise to coverage under section 3, i.e., the practice or procedure in effect when the suit is commenced.

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baseline. Prior to the February 9, 1983 hearing, during which the court advised the County Commission to adopt for possible consideration as a "legislative plan" a remedial election system and reapportionment plan, the issue before the court was limited to the reapportionment plan to be instituted for the next elections. In its Memorandum Decision, the court incorrectly suggests that, if the "no retrogression" standard had been applicable, the reapportionment plan set forth in its December 1979 Order would have been the retrogression baseline. McMillan v. Escambia County, Fla., 559 F.Supp. at 729-30.

The last elections for the County Commission were held in 1978, and no elections for the County Commission have been held under the December 3, 1979 Order. On March 10, 1980, the Fifth Circuit stayed the December 3, 1979 Order, McMillan v. Escambia County, Fla., No. 78-3507 (5th Cir. Mar. 10, 1983), and the stay remained in effect through the Fifth Circuit's issuance of the mandate in *McMillan III*. While the stay was in effect, the 1980 census was published, and, based thereon, the County Commission, on December 22, 1981, adopted a reapportionment plan. Accordingly, by the time the Fifth Circuit issued its opinion in *McMillan III*, the issue of the validity of the reapportionment plan set forth in the December 3, 1979 Order was moot, and the Fifth Circuit's decision, while silent on the reapportionment issue, may not be read as having affirmed the portion of the December 3, 1979 Order imposing a court-ordered reapportionment plan but, rather, only that portion of the Order directing the county commission to reapportion the county commissioners' districts following each decennial census. For these reasons, and the reasons set forth at 24-26 *supra* and *infra*, the December 3, 1979 Order, under no circumstances, could serve as the retrogression baseline.

[80] *Lockhart*, _____ U.S. _____, 103 S.Ct. at 1003.

Applying as the retrogression baseline the election system and apportionment plan in effect when the suit was brought, both alternative remedial election systems and reapportionment plans the County Commission adopted following the February 9, 1983 hearing more than satisfy the "no retrogression" standard this Court articulated in *Beer* and, most recently, in *Lockhart*. When the suit was commenced, all five county commissioners were elected at-large and blacks comprised thirty-two (32) percent of the registered voters and approximately fifteen (15) percent of the population in one district and lesser percentages in other districts.[81] Both alternatives the County Commission adopted provide for five county commissioners to be elected from single-member districts and two county commissioners to be elected at-large.[82] One alternative apportions the county commissioners' districts according to the County Commission's December 22, 1981 reapportionment plan, which established one district in which blacks comprised forty-one (41) percent of the registered voters and forty-eight (48) percent of the population.[83] The other alternative deliberately provides a district in which blacks comprise a majority of the population and the registered voters.[84] Under these circumstances, the court should have precleared both alternatives the County Commission adopted.[85]

[81] Defendants' Reply to Plaintiffs' Opposition to Defendants' Conditional Request for Preclearance of Reapportionment Plan, Affidavit of Joe Oldmixon ¶¶ 4, 5. (Mr. Oldmixon is the Supervisor of Elections for Escambia.)

[82] Defendants' Memorandum in Response to the Court's February 9, 1983 Letter at Appendix B, Exhibits A, B.

[83] *Id.* at Exhibit A.

[84] *Id.* at Exhibit B.

[85] Just as section 5 requires additionally a finding that a proposed change affecting voting does not have the purpose of denying or abridging the right to vote on account of race, section 3 also requires

IV. An Election System or Reapportionment Plan a Legislative Body Adopts for the Purpose of Remedying Violations a Court Has Found To Exist and Which Has Not Been Implemented Cannot Violate the Constitution or Section 2.

In an effort to provide for all possible contingencies so as to ensure the result it desired, the court determined that,

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such a determination. The proposed changes the County Commission adopted were adopted for the purpose of providing a remedy for the violations the court found to exist. As such, no discriminatory purpose was ascribed to the County Commission's actions, and none may be found.

Prior to the February 9, 1983 hearing, when the issue was limited to the apportionment of the county commissioners' districts, respondents acknowledged that the County Commission's December 22, 1981 reapportionment plan had been adopted free of racial considerations but, nevertheless, suggested that the plan had been adopted for a discriminatory purpose. Plaintiffs' Opposition to County Commissioners' Motion for Section 3 Preclearance Redistricting Plan at 4-5. In support of their suggestion, respondents contended that the County Commission could have adopted the same reapportionment plan the Escambia School Board had adopted, following publication of the 1980 census, and the court had approved for elections to the Escambia School Board. *Id.*

As petitioners observed in reply, a reapportionment plan may not be adopted both free of racial considerations and also for a discriminatory purpose. Defendants' Reply to Plaintiffs' Opposition to Defendants' Conditional Request for Preclearance of Reapportionment Plan at 5. Petitioners further pointed out that the County Commission had adopted its reapportionment plan more than six (6) months before the Escambia School Board adopted its plan. *Id.* at 6. In addition, the County Commission adopted its plan following the Fifth Circuit's decision in McMillan v. Escambia County, Fla., 638 F.2d 1239 (5th Cir. 1981), *vacated,* 688 F.2d 960 (5th Cir. 1982), *prob. juris. noted,* _____ U.S. _____, 103 S.Ct. 1766 (1983) (No. 82-1295), upholding the at-large system of electing Escambia's County Commissions, under which system the racial composition of residency districts is immaterial to the election of minority candidates. Defendants' Reply to Plaintiffs' Opposition to Defendants' Conditional Request for Preclearance at 7. Under these circumstances there is no basis for any suggestion that the County Commission adopted its December 22, 1981 reapportionment plan for a discriminatory purpose.

regardless of the applicable standard, "defendants' plans do violate the constitution [sic] and section 2 of the Voting Rights Act . . . ."[86] The Court provided no reasons for this determination other than the reasons which had led it to conclude that the manifest injustice exception to the "law of the case" doctrine was inapplicable, i.e., petitioners' proposed remedy did not guarantee respondents the opportunity to elect county commissioners in proportion to their percentage of the population.[87] Petitioners' discussion of the reasons why the court's holding on the "law of the case" doctrine was erroneous, at 15-18 *supra,* is applicable here and shows that petitioners' proposed remedy neither violates the Constitution nor section 2.[88] Additionally, as discussed at 27 n. 85 *supra,* petitioners' proposals were adopted for the purpose of providing a remedy for the violations the court found to exist, and there was no contrary evidence or finding of discriminatory purpose. Hence, the proposals do not violate the Constitution.

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[86]McMillan v. Escambia County, Fla., 559 F.Supp. at 729. While the court did not specify which provision or provisions of the Constitution petitioners' proposals violate, it is reasonable to assume that the court was referring to the fourteenth amendment or, arguably, the fifteenth amendment. To establish a violation, both provisions require a finding of discriminatory purpose. Rogers v. Lodge, _____ U.S. _____, _____, 102 S.Ct. 3272, 3275-76; City of Mobile, Ala. v. Bolden, 446 U.S. 55, 62, 66-67, 102 (1980) (plurality opinion and dissenting opinion of Justice White).

[87]Section 2 expressly provides that minorities are not entitled thereunder to proportional representation.

[88]The issues concerning Florida's state policy and the defeat of the charter proposal have no bearing on the constitutionality or the validity under section 2 of petitioners' proposed remedy. However, assuming arguendo, they do have some bearing, petitioners' response to the court's reasoning, as set forth at 17 n. 64 *supra,* is equally applicable here.

Petitioners' proposals also do not violate section 2 because neither proposal ever was put into effect. A violation of amended section 2 is established only if the challenged practice or procedure *"results* in a denial or abridgment of the right of any citizen of the United States to vote on account of race. . . ."[89] Elections have not been held under either of petitioners' proposals, and, accordingly, neither proposal violates section 2.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari before judgment to the United States Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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[89](Emphasis added.)

APPENDIX A

March 11, 1983 Order and Memorandum Decision in *McMillan v. Escambia County, Florida*

1. Order

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA PENSACOLA DIVISION

HENRY T. McMILLAN, *et al.*, Plaintiffs,

vs.

ESCAMBIA COUNTY, FLORIDA, *et al.*, Defendants.

PCA 77-0432

OFFICE OF CLERK
U.S. DISTRICT OF
NORTH DIST., FLA.
PENSACOLA, FLA.

1983 MAR 11 PM 4:29

FILED

ORDER

Pursuant to and in accordance with memorandum decision of this date, it is

ORDERED as follows:

1. For the purpose of electing members of the Escambia County Board of County Commissioners, Escambia County shall be reapportioned into five single-member districts, the numbers and boundaries of which shall conform to the five districts shown on Exhibit A attached hereto. A map of the county showing such districts shall be available for inspection in the office of the clerk of this court.

2. At the scheduled primary and general elections, as set forth in this order, commissioners representing all five single-member districts shall then be elected; provided, however, the court retains the power to alter the dates of the aforesaid elections, upon the appropriate motion of one or more of the parties, or upon its own motion, depending in particular upon the course of future events in connection with the appeal now pending to the Supreme Court of the United States from the decision of the Court of Appeals affirming the judgment of the court, or any appeal from this order.

3. The first election for members of this Board of County Commissioners shall be held in accordance with the schedule set out in this order.

4. Qualifying for the Escambia County Board of County Commissioners shall be opened at noon, July 5, 1983, and closed at noon, July 19, 1983. The first party primary election shall be held on Tuesday, September 13, 1983 with any necessary primary runoff election held on Tuesday, October 4, 1983. The general election shall be held on Tuesday, November 1, 1983.

5. Those elected at the elections scheduled in this order shall serve the terms set forth herein.

Those elected from Districts 1, 3, and 5 shall serve a term commencing on the second Tuesday following such election and continuing through the general election in 1988, with terms expiring on the Monday immediately preceding the second Tuesday after such general election. Those elected from Districts 2 and 4 shall serve terms commencing on the second Tuesday following such election and continuing through the general election in 1986, with terms expiring on the Monday immediately preceding the second Tuesday after such general election.

In elections held in 1986, and 1988, and thereafter, all members shall be elected for four-year terms, with terms commencing and expiring as provided by the law of Florida.

The court intends by this order to preserve the staggered terms now provided by the law of Florida for the members of this commission, as well as, to the extent practical, to preserve the beginning and ending dates and the length of terms of office now provided by the law of Florida. If, during the period of time this court retains jurisdiction of this action, there is any change in the law of Florida respecting these matters, the court reserves the power on motion of one or more parties, or on its own motion, to alter or change the requirements of this order to conform with the changed requirements of Florida law.

6. Following the publication of each federal decennial census, the districts from which members of the Escambia County Board of County Commissioners are elected shall be reapportioned to fairly comply with one-person, one-vote requirements and the orders or judgments of this court.

It is further ORDERED AND ADJUDGED that the defendants Escambia County, the Board of County Commissioners of Escambia County, Gerald Woolard, Kenneth Kelson, John E. Frenkel, Jr., Marvin Beck, and Billy G. Tennant, individually and in their official capacities as members of the Escambia County Board of County Commissioners; Joe Oldmixon, individually and in his official capacity as Supervisor of Elections for Escambia County, their successors, officers, agents servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, are hereby enjoined from failing to:

(A) Redistrict and reapportion as set out above; and

(B) Make and hold the elections as redistricted and ordered above.

Pursuant to 42 U.S.C. § 1973a, the court retains jurisdiction of this action for a period of five years unless such period is shortened or extended by further order of this court. During the period of retained jurisdiction, no voting qualification or prerequisite to voting, or standard, practice or procedure with respect to voting different from that in force or effect at the time this action was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color; provided that such qualification, prerequisite, standard, practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of Florida or of Escambia County to the Attorney General of the United States and the Attorney General has not interposed an objection within sixty days after such submission, except that neither this court's finding nor the Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice or procedure.

DONE AND ORDERED this 11th day of March, 1983.

/s/

WINSTON E. ARNOW, Senior Judge

PLAINTIFFS' PLAN B

Summary

Optimum Districts = 46,479

District	Population	Deviation
I	46,368	−.002
II	46,481	+.00004
III	46,456	−.0004
IV	46,628	+.003
V	46,462	−.0003

Max. deviation ± .005

District 3 contains 63.5% black population and 55.7% black registered voter majorities.

DISTRICT I

PCT.	POP.	W	B	O	REG. VOTERS	W	B	O
1	6117	5446	389	282	2050	1978	57	15
5	3322	3236	43	43	1744	1721	15	8
26	5617	5203	73	341	1879	1832	30	17
41	4838	4553	171	114	1947	1898	42	7
43	2748	2670	5	73	1188	1186	1	1
54	2349	2160	45	144	1300	1271	14	15
55	2326	1712	590	24	906	899	6	1
61	4577	4289	87	201	2100	2027	52	21
83	4324	3860	220	244	1260	1223	28	9
87	2924	2815	5	104	1051	1036	3	12
97	2458	2333	65	60	965	943	21	1
99	2128	2043	38	47	1031	1026	4	1
105	2640	2563	31	46	1548	1540	3	5
TOTAL	46,368	42,883	1,762	1,723	18,969	18,580	276	113

DISTRICT II

PCT.	POP.	W	B	O	REG. VOTERS	W	B	O
2	1255	882	321	52	395	331	64	0
3					1454	1422	18	14
78	9920	9215	373	332	865	836	22	7
79					1056	1028	26	2
80					914	909	4	1
24					1865	1795	69	1
44	7675	6531	714	430	816	798	15	3
58					784	747	33	4
32	1164	832	240	92	495	430	65	0
34	2846	2336	396	114	1001	877	114	10
82	3342		203		942	903	39	0
57	1254	1067	131	56	553	523	29	1
59	2202	2086	56	60	1107	1098	4	5
71	2151	1991	124	36	1048	1036	9	3
77	3453	2927	386	140	796	755	39	2
81					1131	1075	53	3
104	4728	4255	318	155	623	592	24	7
84	1376	442	912	22	594	211	380	3
102	2545	2270	228	47	933	920	12	1
103	2570	2250	225	95	1009	968	36	5
TOTAL	46,481		4,627		19,153	17,986	1,092	75

DISTRICT III

PCT.	POP.	W	B	O	REG. VOTERS	W	B	O
12	1267	289	947	31	411	140	271	0
13W					357	85	271	1
14					719	346	372	1
27	8854	3147	5426	281	401	241	160	0
31					1460	342	1118	0
56					1202	780	420	2
15	1434	601	677	156	1889	1567	303	19
17	2551	1203	1336	12	657	307	348	2
25	1422	1351	48	23	451	446	5	0
28	3830	73	3757	0	1659	50	1609	0
47	1611		191		772	732	32	0
48	8015	2921	4970	124	2423	908	1514	1
49					651	27	623	1
50	4924	1715	3180	29	1101	502	598	1
72					863	626	237	0
62	3246	1007	2212	27	1492	655	836	1
76	2602	453	2143	6	1070	219	851	0
90	2079	16	2061	2	885	5	880	0
98	1248	246	996	6	582	185	397	0
109	1542	229	1308	5	537	162	375	0
113	1831	1503	268	60	656	587	69	0
TOTAL	46,456		29,520		20,238	8,912	11,289	29

63.5% Black population

55.7% Black reg. voters

DISTRICT IV

PCT.	POP.	W	B	O	REG. VOTERS	W	B	O
4	3310	3196	28	86	1726	1704	15	7
35					2607	2566	33	8
42					1192	1174	14	4
64					1716	1662	44	10
66					404	396	7	1
96	26949	25018	1485	446	1384	1371	11	2
100					942	649	293	0
106					1396	1381	11	4
107					1533	1519	11	3
110					1781	1716	60	5
114					1418	1402	10	6
46	1306	1286	10	10	943	938	3	2
51	2291	2069	158	64	896	833	62	1
63W[2]	497	460	13	24	268	260	5	3
108	3994	3730	163	101	1764	1703	54	7
39	1380	1220	121	39	878	843	35	0
40	2592	2131	437	24	1790	1574	215	1
93	1800	1141	618	41	961	734	223	4
94	1789	1771	5	13	961	959	1	1
13E[1]	720	638	59	23	376	347	24	0
TOTAL	46,628	42,660	3,097	871	24,931	23,731	1,131	69

DISTRICT V

PCT.	POP.	W	B	O	REG. VOTERS	W	B	O
6	2684	2504	140	40	889	876	11	2
7	2477	2411	33	33	1291	1279	9	3
8	2561	2479	30	52	1178	1170	7	1
10	522	489	7	26	251	251	0	0
11	956	646	290	20	366	315	51	0
16	237	205	9	23	89	88	1	0
18	859	848	0	11	327	327	0	0
19	2953	2410	508	35	1238	1086	152	0
20	1189	655	526	8	296	199	97	0
21	3796	2352	1404	40	1275	950	322	3
22	1670	871	785	14	807	477	330	0
23	1289	1270	16	3	374	372	1	1
33	1030	1003	6	21	374	374	0	0
36	2564	1913	617	34	891	774	117	0
37	4318	4170	56	92	1981	1951	27	3
45	428	412	0	16	165	165	0	0
53	4350	3046	1214	90	1537	1171	359	7
69	2030	1313	680	37	679	477	201	1
101	2966	2730	151	85	1138	1098	40	0
111	1971	1820	68	83	905	892	11	2
112	2326	2238	38	50	967	952	13	2
70	1985	1844	93	48	1211	1155	50	6
63E[2]	1301	1216	65	20	711	687	22	2
TOTAL	46,462	38,845	6,736	881	18,940	17,086	1,821	32

ARAGON
CEMETERY
7

7(a)

[1]Precinct 13 is divided into 13E and 13W. Precinct 13E consists of the following census divisions:

Tract 9 Blocks 611, 612, 613, 614, 615, 616 and 618.

Tract 8 Blocks 417 to 421, 423 to 428, 503, 504, 508 and 509.

Tract 7 Blocks 101, 102, 129, 130, 143.

Precinct 13E contains 720 persons of whom 59 are black and 23 "other."

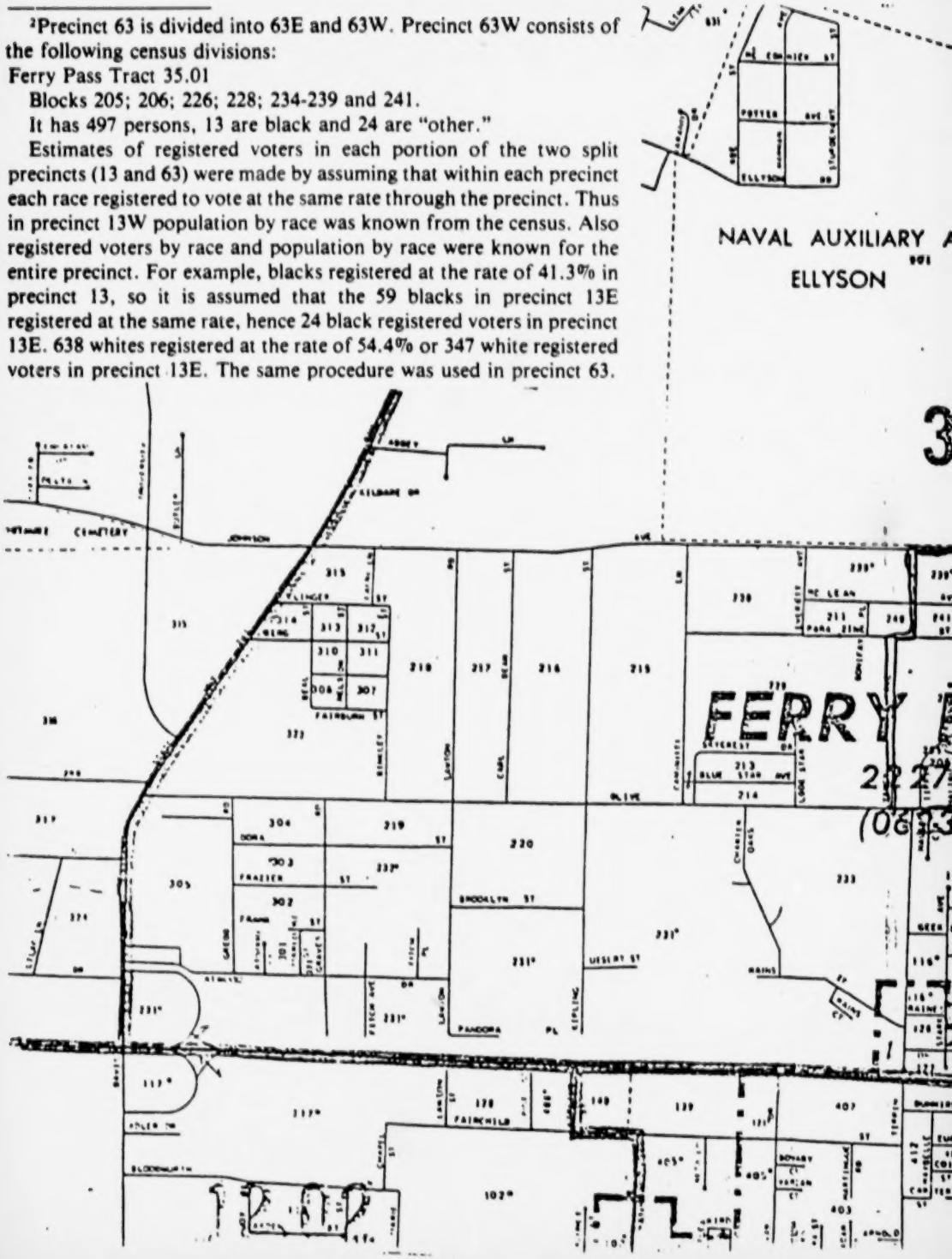
[2]Precinct 63 is divided into 63E and 63W. Precinct 63W consists of the following census divisions:

Ferry Pass Tract 35.01

Blocks 205; 206; 226; 228; 234-239 and 241.

It has 497 persons, 13 are black and 24 are "other."

Estimates of registered voters in each portion of the two split precincts (13 and 63) were made by assuming that within each precinct each race registered to vote at the same rate through the precinct. Thus in precinct 13W population by race was known from the census. Also registered voters by race and population by race were known for the entire precinct. For example, blacks registered at the rate of 41.3% in precinct 13, so it is assumed that the 59 blacks in precinct 13E registered at the same rate, hence 24 black registered voters in precinct 13E. 638 whites registered at the rate of 54.4% or 347 white registered voters in precinct 13E. The same procedure was used in precinct 63.



NAVAL AUXILIARY AIR STATION
ELLYSON FIELD
35.01
FERRY PASS
2227
(0613)
8(a)

2. Memorandum Decision

Henry T. McMILLAN, et al., Plaintiffs,

v.

ESCAMBIA COUNTY, FLORIDA, et al., Defendants.

No. PCA 77-0432.

United States District Court, N.D. Florida, Pensacola Division.

March 11, 1983.

* * *

James U. Blacksher and Larry T. Menefee, Mobile, Ala., for plaintiffs.

Paula G. Drummond, County Atty., Pensacola, Fla., Thomas Silverstein, Charles S. Rhyne, Washington, D.C., for defendants.

MEMORANDUM DECISION

ARNOW, Senior District Judge.

This cause is before this court on remand from the Court of Appeals for the Fifth Circuit, 688 F.2d 960 (5th Cir. 1982). The decision of the Court of Appeals affirms a remedial plan adopted by this court in 1979 and, in view of the passage of time, instructs this court to revise the scheduling terms of its remedial order, 688 F.2d at 973. Defendants' petition for a stay has been denied by both the Court of Appeals and a justice of the Supreme Court of the United States.

By letter dated November 29, 1982 this court instructed the parties to submit proposed election plans and schedules on or before December 21, 1982. Plaintiffs and

defendants submitted their respective proposals and this court conducted a hearing on December 28, 1982 at which the parties were given the opportunity to be heard in oral argument in support of their proposals.

In its return of the case to this court, the Court of Appeals remanded with instructions to revise the scheduling terms of the remedial order. However, all parties, including the defendant Supervisor of Elections, agreed that, in light of the intervening 1980 federal decennial census, the single-member district boundaries contained in this court's 1979 order are now malapportioned on a population basis.

To this court, the Court of Appeals' decision has established the law of this case. However, one of the exceptions to the law of the case doctrine is where the evidence on a subsequent trial is substantially different. *White v. Murtha,* 377 F.2d 428 (5th Cir. 1967); *U.S. v. Robinson,* 690 F.2d 869 (11th Cir. 1982); *Baumer v. U.S.,* 685 F.2d 1318 (11th Cir. 1982).

Evidence now presented respecting malapportionment requires revision of the division boundaries in its prior order to provide compliance with the one-person one-vote rule.

At the hearing on December 28, 1982 all parties were in agreement also about the timetable for conducting new elections in the fall of 1983, citing substantial practical difficulties in holding county commission elections at the same time as Pensacola city elections in the spring of 1983 or holding county commission elections shortly thereafter in the summer of 1983.

However, they disagreed sharply over the form of the election scheme that should be included in this court's order. Plaintiffs urged this court to order county commis-

sion elections held pursuant to the five single-member district plan adopted for the Escambia County School Board by order dated July 1, 1982.[1] Defendants, on the other hand, contended that the elections should be held on an at-large basis utilizing residence subdistricts that had recently been drawn by the county commissioners pursuant to the authority provided them by the general law of Florida governing at-large county commission elections. At the hearing on December 28, 1982, and at a conference in chambers following the hearing, additional problems and questions were suggested concerning a draft order that had been proposed by the court.

It had been suggested that, unless there was some legal reason why such could not be done, it would be well for the five county commission districts to conform to the boundaries of the election districts of members of the Escambia County Board of Education. The thought advanced was that such would probably make for less voter confusion and, in addition, would probably be easier for the election officials in setting up elections.

This was done in the court's order of December 3, 1979, approved on appeal; the same districts for the five member Board of County Commissioners as approved were the same as those previously approved for the Escambia County Board of Education.

Because of population changes, disclosed by the 1980 decennial census, heretofore the Escambia County School Board submitted to this court a revised election plan. This court on hearing concerning it found that it complied with constitutional and legal requirements and that it should be adopted. In drafting, the suggested order for the county commission this court included the same five districts as suggested for the school board.

[1]Subsequently, they suggest minor changes to reduce population variances.

At the court's direction, because of these various matters, the parties were directed to present in writing their comments and objections to this court's proposed order. In addition, following receipt of such, a further hearing was held at which evidentiary matters have been presented either by stipulation or by evidence.

In its decision of September 24, 1979, this court held that, under what it believed was the controlling rule in *Wise v. Lipscomb,* 437 U.S. 535, 98 S.Ct. 2493, 57 L.Ed.2d 411 (1978), the defendant County Commission could not present to this court an election plan designed to remedy the constitutional violation this court had found to exist because it had no legislative authority to enact such a plan. In its decision on rehearing, affirming this court, the Court of Appeals for the Fifth Circuit agreed.

McDaniel v. Sanchez, 425 U.S. 130, 101 S.Ct. 2224, 68 L.Ed.2d 724 (1981), was rendered after this court's decision of September 24, 1979, but prior to the decision on rehearing of Fifth Circuit. It was not mentioned in the appellate court's decision for rehearing and, so this court is advised, the parties to the appeal did not call it to the appellate court's attention.

In *McDaniel,* the court, discussing both Justice White's opinion and Justice Powell's opinion in *Wise,* said;

> Neither East Carroll nor Wise decided the precise question that is now presented. Nonetheless, both Justice White's opinion and Justice Powell's opinion surely foreshadowed the holding we announce today. For both opinions indicate that the fact that the reapportionment plan before us was devised in response to an order of a federal court does not change its character as a legislative plan. In addition, Justice Powell's opinion indicates that the Commissioners Court's power under Texas law to adopt this plan should be irrelevant to the decision in this case.

Further in the opinion the court said:

> The application of statute also is not dependent upon any showing that the Commissioners Court had authority under state law to enact the apportionment plan at issue in this case. As Justice Powell pointed out in *Wise v. Lipscomb,* 437 U.S. 535, 57 L.Ed.2d 411, 98 S.Ct. 2493, the essential characteristic of a legislative plan is the exercise of legislative judgment. The fact that particular requirements of state law may not be satisfied before a plan is proposed to a federal court does not alter this essential characteristic.

The decision also pointed out that Justice Powell disagreed with Justice White's suggestion that *East Carroll* [*Parish School Board v. Marshall,* 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296] had held that a proposed reapportionment plan may be considered legislative only if the legislative body that suggested the plan had authority to enact it under state law and stated that "In Justice Powell's view, the legislative body's authority under state law was irrelevant to the question before the court. He explained that the critical difference between a legislative plan and a court imposed plan for purposes of substantive review was that the former reflected the policy choices of the elected representatives of the people, whereas the latter represented the remedial directive of a federal court. Deference to the judgment of the legislative body was required even if that body lacked authority under state law to adopt the proposed reapportionment plan." 425 U.S. at 144, 101 S.Ct. at 2233, 68 L.Ed.2d at 736.

It appeared to this court that, under *McDaniel,* this court and the appellate court were wrong in concluding defendants might not present to this court an election plan that was not entitled to legislative deference because they were without legislative power to enact it. When such was announced at a hearing on February 9, 1981, counsel for

plaintiffs disagreed; counsel for defendants were uncertain about it.

At the court's request, the parties have submitted memoranda going into the meaning and effect of *McDaniel* as well as the question whether, since *McDaniel* was not a decision subsequent to the Fifth Circuit's decision holding the defendants' plan may not be considered as legislative, the law of this case has been established so that any holding of *McDaniel* may be disregarded.

In memorandum, plaintiffs point out *Wise* involved the question whether a court should defer to a local government's proposal to adopt an election plan that includes multi-member districts or at-large seats and *McDaniel* involved the question whether a local government's proposal to change the boundaries of a court ordered single-member district plan should be precleared under the Voting Rights Act before it is considered by the court.

Plaintiffs' contention is that *McDaniel* is limited to the "narrow, statutory" question concerning section 5 of the Voting Rights Act of 1965 and that it did not overrule *Wise*.

Defendants, not surprisingly, now contend that it appears in *McDaniel* the Supreme Court has determined that Justice Powell's analysis controls the determination whether a remedy is or is not a "legislative plan". In addition to *McDaniel*, they cite *Hughley v. Adams*, 667 F.2d 25 (5th Cir. 1982) and *Edge v. Sumter County School District*, 541 F.Supp. 55 (M.D.Ga. 1981).

[1] To this court, in *McDaniel* the Supreme Court went beyond *Wise*. It adopted Justice Powell's view, as set forth in his concurring opinion in *Wise*, and said that, where a reapportionment plan is devised in response to an

order of a federal court, it is entitled to deference as a legislative plan regardless whether the body presenting it lacked the authority under state law to adopt it.

It is, of course, correct that the issue involved in *McDaniel* was a question of preclearance under the Voting Rights Act. But the court itself, in reaching its conclusion, pointed, out that it drew significant guidance from prior cases in which the substantive acceptability of a reapportionment plan, rather than applicability of section 5, was at issue. Justice Powell's concept as a principle has equal force whether it is applied in a voting dilution suit or in a section 5 preclearance suit.

Plaintiffs contend that the law of the case is established in *McMillan v. Escambia County,* 688 F.2d 960 (5th Cir. 1982), in which the Court of Appeals affirmed this court's analysis of the remedy issue, and that the holding requiring a court-ordered plan using single-member districts exclusively has finality as the law of the case.

Cited in support is the statement contained in 1B *Moore's Federal Practices* § 0.404(10), p. 573 n. 15 (citation omitted):

> The Supreme Court stated the general rule at an early date in this matter: "whatever was before the Court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it upon any matter decided on appeal for error apparent; nor intermeddle with it, further than to settle so much as has been remanded."

Pointing out a clear exception to the rule is that "A federal court must apply new and supervening rule of — federal law to the decision of federal issues when the new legal rule is valid and applicable to the issues of the case" plaintiffs also point out that *McDaniel* was not an intervening case. This case was decided on June 1, 1981 and Fifth Circuit entered its judgment on rehearing on September 24, 1982.

[2] Defendants do not quarrel with the application of the law of the case doctrine to this case. Instead, citing such cases as *White v. Murtha,* 377 F.2d 428 (5th Cir. 1967), *U.S. v. Robinson,* 690 F.2d 869 (11th Cir. 1982), *Baumer v. U.S.,* 685 F.2d 1318 (11th Cir. 1982), defendants point out that a decision by an appellate court must be followed in the trial court on appeal unless one of three exceptions applies and that one of these exceptions is where a decision is clearly erroneous and would work a manifest injustice. They contend that in order to avoid an incorrect and unjust result this court may, and, indeed, should, reconsider the remedy issue.

The fallacy in that contention is that the defendants, though given opportunity, have not shown the decision, if erroneous, works a manifest injustice.

The plan the court ordered into effect on December 3, 1979, and that was approved on appeal, contained one of five districts with a majority in black population and registered voters. As blacks constituted approximately 20% of the county's population and 17% of its registered voters, the plan was arranged so as to provide them with an opportunity to elect membership to the commission in proportion to their population percentage.

The plan proposed by defendants in 1979 called for a seven member commission with five single-member

districts and with two members elected at-large. The proposed seven member commission would, at most, provide blacks with an opportunity to elect 14% rather than 20% of the commission's membership. It would not provide an adequate remedy for the unconstitutional vote dilution found to exist in this case.

There is another reason why the seven member commission plan should not have been placed into effect by this court.

From *White v. Weiser,* 412 U.S. 783, 795, 93 S.Ct. 2348, 2355, 37 L.Ed.2d 335, 346 (1973).

> In fashioning a reapportionment plan or in choosing among plans a district court should not preempt the legislative task nor "intrude upon state policy any more than necessary." *Whitcomb v. Chavis,* 403 U.S. 124 [160, 91 S.Ct. 1858, 1878, 29 L.Ed.2d 363].

[3] Article 8, § 1 of Florida's constitution provides that, except when otherwise provided by county charter, the governing body of each county shall be a board of county commissioners composed of five members serving staggered terms of four years.

Escambia County has no county charter. As the record shows, its voters, during the pendency of this suit, rejected a county charter proposal. That proposal included a proposal to establish a seven member commission with five to be elected from single-member districts and two to be elected at-large.

These defendants, in proposing a seven member commission, contravene the five member state policy and, apparently, go also contrary to the will of the people of Escambia County as evidenced by their rejection of the

county charter. Any legislative deference that should be given to any plan proposed by these defendants should not include accepting their proposal of a seven member commission.[2]

In short, while the reasoning of this court, and of the appellate court, may have been erroneous, the conclusion was correct. There is no manifest injustice here to be considered or corrected and no exception to the doctrine of the law of the case to be applied.

As plaintiffs point out, this court has no choice but to carry out the mandate of Fifth Circuit.

At the hearing on February 9, 1983, following this court's announcement concerning *McDaniel,* defendants requested and were given time to present another plan and further hearing was scheduled for March 10, 1983.

[4] At the March 10, 1983 hearing defendants presented for consideration not one but two plans. Counsel for defendants stated in effect that any other plans theretofore presented by defendants were withdrawn and need not be considered by the court.

Counsel for plaintiffs stated the only plan now presented for consideration by the plaintiffs was the amended plan containing the 5% population deviation previously tendered by plaintiffs.

The defendants' plans call for a seven member county commission, with five to be elected from single-member districts, and two to be elected at-large. Plan A contains no district having a majority of black population and registered voters, and Plan B contains one district having a

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[2]This also applies to the two seven member proposals of these defendants now before this court.

black majority in population and registered voters.[3] The maximum population deviation in Plan A is ± 2.8% and in Plan B ± 4.4%.

Neither plan complies with the five member single-district plan, with one district having a majority in black population and registered voters approved and to be put into effect under Fifth Circuit's decision, and both are rejected.

On the merits, they are also rejected as not providing adequate remedy for the constitutional violation found to exist. Submitted for preclearance under 42 U.S.C. § 1973a(c), they would be denied preclearance because defendants have not on the record carried the burden on them of showing that they do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, because they contain the constitutional vices found to exist in the defendants' plan in this suit, and because they violate section 2 of the Voting Rights Act.

[5] One of the seven member plans – Plan A – preferred by defendants, makes not even a pretense of affording any district in which there is a majority of black population and registered voters. The other one contains one such district. But it calls for a seven member commission and thus dilutes, in violation of the constitution and section 2 of the Voting Rights Act, the voting strength of the black minority. The record in this case establishes blacks, in order to prevent unlawful dilution, should have

[3]Percentage figures, based on the 1980 census, are close to those before the court in 1979. Under 1980 figures, blacks constituted 19.7% of the total population and 15% of the registered voters.

reasonable opportunity to elect 20% of the commission. This Plan B gives them such opportunity to elect only 14% of the commission. In addition, as pointed out, both plans, in suggesting a seven member commission, go contrary to state policy.

Plaintiffs present a plan that has minimal changes from the previously approved school board plan. It does involve splitting or dividing two precincts; evidence at hearing establishes this presents no real problem to election officials. It has an overall maximum population deviation of only 5%. It provides for a five member commission, each elected from a single district and with one district containing a majority in black population and black registered voters. It complies with the one-person, one-vote rule and avoids diluting the potential voting strength of the blacks. It contains the method of preserving the staggered term feature all parties have agreed is appropriate.

As pointed out, defendants' tendered plans must be rejected because they do not comply with the mandate of Fifth Circuit. They should be rejected on the merits, and they may not be precleared under section 3 of the Voting Rights Act. However, Plan B does contain one district with a black population and registered voter majority, and has five districts.

So far as this court is advised, there are no major differences between the boundary lines proposed by Plan B and those proposed by plaintiffs. But its maximum population deviation is ± 4.4%.

Wyche v. Madison Parish Police Jury, 635 F.2d 1151 (5th Cir. Feb. 1981), points out that in devising a reapportionment plan a court is held to equitable standards of voting equality more stringent than those governing a

legislature. "Although the mathematical precision required for congressional districting is not a prerequisite, unless there are persuasive justifications, articulated by the court, a judicially-mandated reapportionment plan must ordinarily achieve the goal of population equality with little more than de minimis variation." Cases cited – page 1159.

There is no persuasive articulation that may be justified in not adopting the plan proposed by plaintiffs. Defendants' counsel point out their Plan B was presented only in connection with the 7 member plan. They did not urge the use of its boundaries if a five member single-district plan were chosen.

Plaintiffs' proposed districts do have the desirable features of conforming closely to the five districts in effect for election of the five members of the Escambia County School Board from single member districts, although Plan B boundaries also closely conform.

[6] On balance, this court concludes it should place in effect the plan proposed by plaintiffs.

Because of contentions presented respecting it, discussion of the Voting Rights Act and its application in this case may be in order.

The prior order of this court, approved on appeal, incorporated for a period of time provisions of section 3 of the Voting Rights Act, 42 U.S.C. § 1973a(c).

[7] Plaintiffs, citing *McDaniel v. Sanchez*, 452 U.S. 130, 101 S.Ct. 2224, 68 L.Ed.2d 724 (1981), and *U.S. v. Board of Supervisors*, 429 U.S. 642, 97 S.Ct. 833, 51 L.Ed.2d 106 (1977), contend that these defendants may not have consideration by this court of the resident district

boundaries adopted by them until there has been preclearance of them under 42 U.S.C. § 1973c.

That contention is without merit. As these cases point out, they dealt with political subdivisions covered by the act and to which section 5 of the act – 42 U.S.C. § 1973c – applies. There is not dealt with in this case a political subdivision covered by the act and section 5 has no application to this suit.

However, as pointed out, 42 U.S.C. § 1973a(c) is applicable here. Its preclearance terms were included in the remedial order of this court that has been approved by the Court of Appeals.

Under *Georgia v. United States,* 411 U.S. 526, 93 S.Ct. 1702, 36 L.Ed.2d 472 (1973), as *McDaniel* points out, a reapportionment plan is a "standard, practice or procedure with respect to voting" within the meaning of section 5. The exact language is also contained in 42 U.S.C § 1973a(c). Under that decision the plan here proposed is a "standard, practice or procedure with respect to voting" under 1973a(c) so that the provisions of that act are applicable to it.

Under *Georgia,* and cases cited in it, the right to vote can be affected by a dilution in voting power as well as by an absolute prohibition when casting a ballot.

Respecting the effect of section 3 of the Voting Rights Act in this case both parties cite *Beer v. U.S.*, 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976), and make different contentions respecting the retrogression principle as applicable to this case. Defendants also cite *Lockhart v. U.S.*, – U.S. –, 103 S.Ct. 998, 74 L.Ed.2d – (1983).

These cases dealt with section 5 and not section 3 of the

Voting Rights Act. No cases have been cited or found dealing with section 3.[4]

Beer, construing section 5, held that its purpose was to insure that no voting procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise. It stated that the language of section 5 applied only to proposed changes in voting procedures and that discriminatory practices instituted prior to November 1964 are not subject to preclearance under it. It concluded that a new legislative apportionment scheme which enhances the position of racial minorities cannot violate section 5 unless the new apportionment itself so discriminates on the basis of race or color so as to violate the United States Constitution.[5]

Lockhart held that, since the new plan under consideration did not increase the degree of discrimination against blacks, it was entitled to section 5 preclearance.

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[4]An explanation for this is found in the congressional history given in No. 5, July 1982, U.S.Code Congressional & Administrative News, p. 193, footnote 44. According to that footnote, apparently only two counties – Escambia County, Florida and Thurston County, Nebraska – are covered by the preclearance provisions of section 3(c) as the result of court order.

[5]A portion of footnote 31, found at p. 189, No. 5, July 1982, U.S.Code Congressional & Administrative News, reads as follows:

> Under the rule of *Beer v. United States,* 425 U.S. 130, 96 S.Ct. 1357, 47 L.Ed.2d 629 (1976), a voting change which is ameliorative is not objectional unless the change "itself" so discriminates on the basis of race or color as to violate the Constitution." 425 U.S. at 141, 96 S.Ct. at 1364; *see also* 142 n. 14, 96 S.Ct. at 1364 n. 14 (citing to the dilution cases from *Fortson v. Dorsey,* 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d L.Ed.2d 314). In light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2.

As the parties point out, much of the language in section 3 is identical to that in section 5 but to this court there are significant differences between the two sections.

Section 5 has language referring to standards, etc., different from those in effect on particular dates. It is applicable to covered political subdivisions and applies regardless whether a suit is pending. It is intended only to prevent retrogression, at least as the Supreme Court has construed it.

As Justice Marshall points out in the dissenting opinion in *Lockhart*, the court in *Beer* relied on a committee report dealing with section 5; the report did not deal with section 3 nor has this court found any such report dealing with section 3.

[8] Section 1973a(c) applies to situations such as the one found here — in which a court has found in a suit a violation of the fourteenth or fifteenth amendments justifying equitable relief. It does not come into play until that situation is presented. Its reference is to any standard, etc., different from that in force and effect at the time the suit was commenced.

[9] To this court that provision of the act involves no retrogressive principle. It means exactly what it says. Applied to this case, the plan adopted by the defendants, pursuant to Florida's reapportionment law following a 1980 census, for example, must be precleared before being effective.[6] It must be precleared because it is a change from the standard in effect at the time the suit was instituted and it may not be precleared unless the court finds that it does not have the purpose and will not have the effect of denying the right to vote on account of race or color.

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[6] As must other plans proposed by defendants.

In making that determination the court does not compare that plan with defendants' plan in effect at the time this suit was commenced and find that it does not violate the requirements of section 3 if it is no worse than that plan.

If that were the purpose of section 3, for example, defendants could adopt almost any form of discriminatory voting practice, and it would not be subject to preclearance, because it would not be worse discrimination than the plan here found to be invalid. Only if such practice was also unconstitutional or violated section 2 would it be subject to the preclearance test of section 3.

As pointed out in *South Carolina v. Katzenbach,* 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769 (1966), the Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting which had infected the electoral process in parts of the United States for nearly a century. The case, referring to House and Senate reports, states that "in many of the political subdivisions covered by paragraph 4(b) of the act voting officials have persistently employed a variety of procedural tactics to deny negroes the franchise often in direct defiance or evasion of federal court decrees". 383 U.S. at 336, 86 S.Ct. at 822 – 23, 15 L.Ed.2d at 791.

The Department of Justice has used its objection power to present it to a South Dakota law that would have nullified the effect of a judicial decision. No. 5, July 1982, U.S.Code Congressional & Administrative News, at 188.

[10] Unlike section 5, section 3 was not designed to preserve the status quo. To the contrary, section 3 was designed to deal with a situation such as that here presented. It was designed to prevent a political subdivi-

sion found in violation of the constitution from performing an end run around and circumventing the court's holding by enacting a new voting plan that was no worse than the one in effect at the time the suit was instituted. The retrogression principle made applicable in section 5 has no place and plays no part in section 3.

From the congressional history found in 1965 U.S.Code Congressional & Administrative News, in discussion of 3(c) at page 2455:

> Subsection 3(c) – This proviso is intended by providing for judicial scrutiny of new or changed voting requirements, to insure against the enaction of new and onerous discriminatory voting barriers by state or political subdivisions which have been found to have discriminated.

The Congress did not intend by enactment of this section to prevent a political subdivision from making election changes, even though its election scheme in effect at the time of suit violated the constitution. But, it did intend that any change would not present a new and onerous discriminatory voting barrier.

Beyond that, however, if *Beers* is authority for applying retrogression principles to section 3 then, under *Beers,* the plan must be found to violate section 3 if it so discriminates on the basis of race or color as to violate the constitution. The congressional history of the 1982 Voting Rights Act amendments points out it must also be found to violate section 3 if it violates section 2 of that act.

Defendants, though contending preclearance is not required, say that if preclearance under section 3 is required no additional evidence need be taken and that this court may make decision on the record before it.

On the record, as previously pointed out, defendants' plans do violate the constitution and section 2 of the Voting Rights Act, so that preclearance under section 3 should be and is denied.

Defendants contend that, in devising an election plan of five districts, one of which contains a majority of black population and registered voters, blacks have been guaranteed proportionate representation in violation of the constitution.

[11] To this court that argument borders on the absurd. The remedial plan of this court, approved on appeal, contains such a district. Obviously, a district in which blacks have a majority in population and in registered voters does not guarantee the election of blacks and does not violate the constitution. To the contrary, under the factual situation in this case, it is the only effective remedy this court was able to devise to remedy the unconstitutional vote dilution here found to exist.

In another contention, defendants say that the retrogressive base line in this case is not the boundaries provided by this court's order of December 3, 1979 because the Fifth Circuit did not affirm the boundaries in that order. The contention, as this court understands it, is that the county reapportioned during the period between the appellate court's reversal of this court and its affirmance on rehearing.

In this decision this court has expressed its views on the question of retrogression under section 3 of the Voting Rights Act. Respecting this contention, however, it points out that, while the appellate court first reversed this court in its remedial order, on petition for rehearing it affirmed. Its mandate was not issued until November 23, 1982; its prior reversal decision was never in effect. The remedial

order entered by this court in 1979 has been valid since 1979 and in effect during all the period of time although stayed by court action while the case was on appeal.

In summary, the mandate of the appellate court to this court requires it to proceed to place into effect the remedial order previously approved with its scheduling terms revised in view of the passage of time. That is the law of this case. Under an exception to the doctrine, because of the evidence now before the court showing malapportionment under the 1980 census, that malapportionment should be corrected.

Defendants contend the manifest injustice exception to the law of the case requires this court to revisit its rejection of the seven member plan proposed by defendants in 1979. But defendants have established no manifest injustice. If this court and the appellate court's ground for rejecting it as unauthorized was erroneous, nonetheless the conclusion reached that it should be rejected was correct.

If the law of the case does not control, it still remains the plans presented by defendants must be rejected. For reasons pointed out in the decision, they may not be precleared under 42 U.S.C. § 1973a(c). They do not provide adequate remedy for the constitutional violations found to exist. So far as they propose seven member commission, they violate Florida's state policy.

Any deference to be accorded them as legislative plans submitted in response to a court order or request does not extend to approving their violation of state policy. In any event, legislative deference, in view of their constitutional vices and Voting Rights Act violations, would not permit their approval.

Other contentions of defendants are without merit.

The amended remedial plan proposed by plaintiffs, containing minimum population deviations, and updated and conforming otherwise to the plan approved by the appellate court, should be adopted by this court.

Finally, in this perhaps too lengthy decision, this court has endeavored to make decision respecting every contention able and ingenious counsel have presented to it. It has done so even though its law of the case conclusion may have mooted some of these contentions.

This case has been pending too long. With elections stayed, no elections have been held for several years. Defendant public officers are holding over as de facto officials beyond their terms of office.

Defendants have appealed before and this court anticipates they will appeal again.

In the untoward event the appellate court disagrees with this court's law of the case conclusion, it may feel other contentions must be resolved.

Sometimes, when a trial judge leave unanswered contentions on the record going to the appellate court, that court is constrained because of necessity or desirability to remand for the trial court's answers. Hopefully, this court has avoided the possibility of such here occurring.

The amended remedial plan proposed by the plaintiffs, will be put into effect by order of the court.

APPENDIX B

Notice of Appeal to the United States Court of Appeals For the Eleventh Circuit

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA

HENRY T. McMILLAN, *et al.*, Plaintiffs,	)	
v.	)	PCA No. 77-0432
ESCAMBIA COUNTY, FLORIDA, *et al.*, Defendants.	)	

OFFICE OF CLERK
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1983 APR 11 PM 3:27

FILED

NOTICE OF APPEAL

Notice is hereby given that defendants Escambia County, Florida ("Escambia") and the members of the Escambia Board of County Commissioners hereby appeal to the United States Court of Appeals for the Eleventh Circuit from the Order imposing an election system and reapportionment plan for elections to the Escambia Board of

County Commissioners entered in this action on the 11th day of March, 1983.

Respectfully submitted,

/s/

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Acting County Attorney
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/s/

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Counsel for Defendants
Escambia County, Florida and
the Members of the Escambia
Board of County Commissioners

APPENDIX C

Selected Provisions of the Voting Rights Act of 1965 and Florida's Constitution and Statutes.

1. Provisions of the Voting Rights Act of 1965.

Section 2, 42 U.S.C.A. § U.S.C.A. § 1973 (Supp. 1983)

> **Denial or abridgement of right to vote on account of race or color through voting qualifications or prerequisites; establishment of violation**

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class

elected in numbers equal to their proportion in the population.

Section 3(c), 42 U.S.C. § 1973a(c) (1976):

> **Retention of jurisdiction to prevent commencement of new devices to deny or abridge the right to vote**

If in any proceeding instituted by the Attorney General or an aggrieved person under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment in any State or political subdivision the court finds that violations of the fourteenth or fifteenth amendment justifying equitable relief have occurred within the territory of such State or political subdivision, the court, in addition to such relief as it may grant, shall retain jurisdiction for such period as it may deem appropriate and during such period no voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect at the time the proceeding was commenced shall be enforced unless and until the court finds that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the voting guarantees set forth in section 1973(b)(f)(2) of this title: *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the court's finding nor the

Attorney General's failure to object shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure.

Section 4, 42 U.S.C. §1973b (1976), *as amended by* 42 U.S.C.A. § 1973b(a) (Supp. 1983).

Suspension of use of tests on devices in determining eligibility to vote

(a) **Action by State of political subdivision for declaratory judgment of no denial or abridgement; three-judge district court; appeal to Supreme Court; retention of jurisdiction by three-judge court**

To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the nineteen years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color. *Provided,* That no such declaratory judgment shall issue with respect to any plaintiff for a period of nineteen years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section,

whether entered prior to or after the enactment of this subchapter, determining that denials or abridgements of the right to vote on account of race or color, through the use of such tests or devices have occurred anywhere in the territory of such plaintiff. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the ten years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of his section: *Provided,* That no such declaratory judgment shall issue with respect to any plaintiff for a period of ten years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this paragraph, determining that denials or abridgements of the right of vote on account of race or color, or in contravention of the guarantees set forth in subsection (f)(2) of this section through the use of tests or devices have occurred anywhere in the territory of such plaintiff.

(b) **Required factual determinations necessary to allow suspension of compliance with tests and devices; publication in Federal Register**

The provisions of subsection (a) of this section shall apply in any State or in any political subdivision of a State which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964. On and after August 6, 1970, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous sentence, the provisions of subsection (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1968, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1968, or that less than 50 per centum of such persons voted in the presidential election of November 1968. On and after August 6, 1975, in addition to any State or political subdivision of a State determined to be subject to subsection (a) of this section pursuant to the previous two sentences, the provisions of subsections (a) of this section shall apply in any State or any political subdivision of a State which (i) the Attorney General determines maintained on November 1, 1972, any test or device, and with respect to which (ii) the Director of the Census determines that less than 50 per centum of the citizens of voting age were registered on November 1, 1972, or that less than 50 per centum of such persons voted in the Presidential election of November 1972.

A determination or certification of the Attorney General or of the Director of the Census under this section

or under section 1973d or 1973k of this title shall not be reviewable in any court and shall be effective upon publication in the Federal Register.

(c) Definition of test or device

The phrase "test or device" shall mean any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

Section 5, 42 U.S.C. § 1973c (1976).

> **Alteration of voting qualifications and procedures; action by state or political subdivision for declaratory judgment of no denial or abridgement of voting rights; three judge district court; appeal to Supreme Court**

Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973(b)(a) of this title based upon determinations made under the first sentence or section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different

from that in force or effect on November 1, 1968, or whenever a State or political subidivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure; *Provided,* That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or

procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following receipt of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 and any appeal shall lie to the Supreme Court.

2. **Provisions of Florida's Constitution and Statutes.**

Fla. Const. art. VIII, § 1(e).

Commissioners. Except when otherwise provided by county charter, the governing body of each county shall be a board of county commissioners composed of five members serving staggered terms of four years. After each decennial census the board of county commissioners shall divide the county into districts of contiguous territory as nearly equal in population as practicable. One commissioners residing in each district shall be elected by the electors of the county.

Fla. Stat. § 124.01 (1981).

Division of counties into districts; county commissioners, etc.

(1) There shall be five county commissioners' districts in each county, which shall be numbered one to five, inclusive, and shall be as nearly equal in proportion to population as possible.

(2) There shall be one county commissioner for each of

such county commissioners' districts, who shall be elected by the qualified electors of the county, as provided by § 1(e), Art. VIII of the state constitution.

(3) The board of county commissioners shall from time to time, fix the boundaries of the above districts so as to keep them as nearly equal in proportion to population as possible; provided, that changes made in the boundaries of county commissioner districts pursuant to this section shall be made only in odd-numbered years.

(4) County commissioners' districts now existing shall remain as now constituted until changed by the board of county commissioners, as provided by the constitution an din this chapter.

(5) This section shall not apply to Dade county.